No. 29

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In the Supreme Court of the United States

October Term, 1958

William B. Cammarano and Mildred Cammarano, His Wife, petitioners

v.

United States of America

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 718

WILLIAM B. CAMMARANO AND LOUISE CAMMARANO, HIS WIFE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The oral opinion of the District Court (R. 27-30) is not reported. The opinion of the Court of Appeals (R. 136-140; Pet. App. A1-A6) is reported at 246 F. 2d 751.

JURISDICTION

The judgment of the Court of Appeals was entered on July 8, 1957. (R. 141.) A petition for rehearing was filed on August 27, 1957, and was denied on October 15, 1957. (R. 142.) The petition for a writ of certiorari was filed on January 10, 1958. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether the courts below correctly held that

amounts expended by taxpayers in an effort to defeat proposed initiative legislation in the State of Washington were not deductible as "ordinary and necessary" business expenses under Section 23(a)(1)(A) of the Internal Revenue Code of 1939.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

> SEC. 23. DEDUCTIONS FROM GROSS INCOME.
>
> In computing net income there shall be allowed as deductions:
>
> (a) [As amended by Section 121(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Expenses.*—
>
> (1) *Trade or business expenses.*—
>
> (A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *.
>
> * * * * *

(26 U.S.C. 1952 ed., Sec. 23.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

> SEC. 29.23(o)-1. *Contributions or Gifts by Individuals.*—* * *
>
> * * * * *
>
> Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other

than trade advertising, and contributions for campaign expenses, are not deductible from gross income.

* * * * *

STATEMENT

This is an action instituted to recover income taxes paid by taxpayers for the year, 1948. Deductions claimed by taxpayers in the amount of $886.29 were disallowed by the Commissioner for that year, resulting in an increase in tax in the sum of $153.98. This amount was paid and this action was instituted for its recovery. (R. 20-22). The relevant facts found by the District Court (R. 44-47) may be summarized as follows:

Taxpayers were husband and wife and filed a joint income tax return for the year 1948. They owned a one-fourth interest in a partnership carrying on the wholesale distribution of beer under the trade name "Cammarano Brothers" in Tacoma, Washington. (R. 44-45.)

In 1948, the partnership paid $3,545.15 to the Washington Beer Wholesalers Association, Inc., Trust Fund, of which taxpayers' proportionate share was $886.29. The trust fund was established on December 17, 1947, by the Association, of which the partnership was a member, to help finance an extensive statewide publicity program on the part of wholesale and retail beer and wine dealers. (R. 45.) The publicity program urged the defeat of "Initiative to the Legislature No. 13", which was submitted to the people of the State of Washington at the general election held on November 2, 1948, in accordance with the legislation provisions of

the State Constitution. The Initiative would have placed the retail sale of wine and beer exclusively in state owned and operated stores. (R. 45.) The ballot title of the Initiative was as follows (R. 45): "An Act prohibiting the retail sale of beer and wine by any person other than the State of Washington, repealing all provisions of existing law pertaining to licensing of retail sale of beer and wine, revoking existing licenses and providing penalties."

The proposal had previously been submitted to the state legislature, and an officer of the Beer Wholesalers Association kept close track of its progress, contacted many of the legislators, and urged its defeat. The legislature did not act on the proposal. (R. 45-46.)

When the proposal was submitted to the people as an initiative measure, the wholesale and retail beer and wine dealers determined to undertake a vast publicity program aimed at the voters. This program was directed by a committee composed of members of the various groups and associations interested in defeating the proposal and was financed by contributions from such groups and associations and other interested parties. The committee established to direct the program was known as the Industry Advisory Committee, which received contributions totalling $231,257.10. Of this total, the sum of $53,500 was contributed by the Beer Wholesalers Association, which collected it by assessing its members in accordance with their volume of business. The collections were handled through a trust fund established as a separate entity to receive and disburse the assessments. The publicity program was carried out by various types of advertising, none of which made reference to the wares or members of the Association as such. The proposal was defeated. (R. 46.)

The District Court found that the payment made by Cammarano Brothers to the trust fund was for propaganda and to defeat legislation, and therefore concluded that it was not an ordinary and necessary expense deductible under Section 23(a)(1)(A) of the Internal Revenue Code. (R. 47-48.) The Court of Appeals affirmed upon the same ground. The Court of Appeals also held, on the basis of a finding by the District Court, that taxpayers had failed to sustain their burden of proving that passage of the initiative, aimed as it was at retail sales of wine and beer, would have impaired their wholesale beer business. (R. 136-140; Pet. A1-A6.)

ARGUMENT

1. Section 23(a)(1)(A) of the Internal Revenue Code of 1939 (*supra*, p. 2) permits the deduction of all "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *." Section 29.23(o)-1 of Treasury Regulations 111 (*supra*, pp. 2-3) precludes the deduction of sums "expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, * * *."

In their petition, taxpayers appear to argue both that the regulation is invalid and, if valid, that it is inapplicable. The validity of an identical regulation has been sustained by this Court in *Textile Mills Corp.* v. *Commissioner*, 314 U. S. 326. And the applicability of the regulation to the type of expenditures involved here is made clear, not only by the *Textile Mills* decision, but also by the decisions of all the Courts of Appeals which have had occasion to pass upon the question. *Revere Racing Assn.* v. *Scanlon*, 232 F. 2d 816 (C.

A. 1st); *American Hardware & Eq. Co.* v. *Commissioner,* 202 F. 2d 126 (C. A. 4th), certiorari denied, 346 U. S. 814; *Roberts Dairy Co.* v. *Commissioner,* 195 F. 2d 948 (C. A. 8th), certiorari denied, 344 U. S. 865; *F. Strauss & Son* v. *Commissioner,* not yet reported (C. A. 8th), decided January 24, 1958 (reproduced as an appendix, *infra,* p. 12); *Sunset Scavenger Co.* v. *Commissioner,* 84 F. 2d 453 (C. A. 9th); *Old Mission P. Cement Co.* v. *Commissioner,* 69 F. 2d 676 (C. A. 9th), affirmed on other issues, 293 U. S. 289.[1]

Taxpayers, therefore, present no question warranting review by this Court.

(*a.*) The validity of a regulation identical to the one here questioned was directly challenged before this Court in *Textile Mills Corp.* v. *Commissioner, supra.* In that case, the taxpayer had employed a publicist to prepare speeches, news items, and editorials, and two attorneys to prepare propaganda material on international relations, treaty rights, and alien property policy, all for the purpose of obtaining the enactment of legislation providing for the return of German property seized by this Government during World War I. There, as here, the taxpayer asserted that the regulation unduly narrowed the scope of the deduction provided by the statute. This contention was rejected by this Court, which held (pp. 338-339) that the statutory phrase "ordinary and necessary" was not so unambiguous as to leave no room for an interpretative regulation and that the regulation in question constituted an ap-

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[1] See also *Davis* v. *Commissioner,* 26 T.C. 49; *McClintock-Trunkey Co.* v. *Commissioner,* 19 T. C. 297, reversed on other grounds, 217 F. 2d 329 (C.A. 9th); *Wm. T. Stover Co.* v. *Commissioner,* 27 T. C. 434; *Mosby Hotel Co.* v. *Commissioner,* decided October 22, 1954 (1954 P-H T. C. Memorandum Decisions, par. 54,288).

propriate exercise of authority by the rule-making body. This holding, as already noted (*supra*, pp. 5-6), has been uniformly followed by the Courts of Appeals.

Moreover, in view of the repeated congressional reenactment of the statutory provision under which the regulation was promulgated, the regulation has acquired the force of law.[2] *Helvering* v. *Winmill*, 305 U. S. 79, 83; *Commissioner* v. *Flowers*, 326 U. S. 465, 469; *Boehm* v. *Commissioner*, 326 U. S. 287, 291-292. This principle has repeatedly been applied to the particular regulation involved here. *Textile Mills Corp.* v. *Commissioner, supra*, pp. 338-339; *Sunset Scavenger Co.* v. *Commissioner, supra*, p. 456; *Roberts Dairy Co.* v. *Commissioner, supra*, p. 950; *American Hardware & Eq. Co.* v. *Commissioner, supra*, pp. 129-130. See also *Commissioner* v. *Heininger*, 320 U. S. 467, 470; *Lilly* v. *Commissioner*, 343 U. S. 90, 95.

(*b*.) Arguing in the alternative that the regulation is inapplicable, taxpayers (Pet. 9) seek to limit this Court's decision in *Textile Mills Corp.* v. *Commissioner, supra*, to "lobbying, i. e., the exertion of pres-

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[2] The regulation first appeared in its present form in Article 562 of Treasury Regulations 45 (1919 ed.), promulgated under the Revenue Act of 1918, and has appeared thereafter without change in all successive regulations. See Article 562 of Treasury Regulations 45 (1920 ed.), 62, 65, and 69, promulgated under the Revenue Acts of 1918, 1921, 1924, and 1926, Article 262 of Treasury Regulations 74 and 77, promulgated under the Revenue Acts of 1928 and 1932, Article 23(o)-2 of Treasury Regulations 86, promulgated under the Revenue Act of 1934, Article 23(q)-1 of Treasury Regulations 94, promulgated under the Revenue Act of 1936, Article 23(o)-1 of Treasury Regulations 101, promulgated under the Revenue Act of 1938, Sections 19.23(o)-1, 29.23(o)-1, and 39.23(o)-1 of Treasury Regulations 103, 111, and 118, respectively, promulgated under the Internal Revenue Code of 1939, and Section 1.162-15 of the proposed Income Tax Regulations under the Internal Revenue Code of 1954.

sures and persuasion on individual legislators * * *." According to taxpayers, this case concerns (Pet. 9) "the wholly different effort 'to saturate the thinking of the community' (*United States* v. *Rumely,* 345 U. S. 41, 47), which is an activity directed at the entire body politic."

But the short answer is that the latter type of activity —designed "to saturate the thinking of the community" —is precisely the type of activity which was involved in *Textile Mills.* The deductions claimed in that case related to the preparation and dissemination of news items, speeches, editorials, and similar material—in other words, not direct dealings with legislators (or "buttonholing"), but rather propaganda "directed at the entire body politic." The expenditures at issue in *Textile Mills* all represented compensation to three individuals—a publicist and two lawyers. None of the three, it appears, ever engaged in what the taxpayers call "lobbying, i.e., the exertion of pressures and persuasion on individual legislators * * *." See 314 U. S. 326, 336; 38 B. T. A. 623, 625.

Taxpayers' reliance on *Rumely,* moreover, is misplaced. That case (p. 44) involved an interpretation of the first clause of a congressional resolution authorizing an investigation of

> "(1) all lobbying activities intended to influence, encourage, promote, or retard legislation; and (2) all activities of agencies of the Federal Government intended to influence, encourage, promote, or retard legislation."

It was there held that publicity efforts "to saturate the thinking of the community" were not encompassed within the first clause. But the Court also made it

abundantly clear that there was no such omission with respect to the broader second clause (*supra*), which was not qualified by the term "lobbying" but instead extended generally to "activities * * * intending to influence, encourage, promote or retard legislation."[3] This second clause is paralleled in every respect by the regulation involved in the instant case. Like that clause, the regulation expressly includes within its terms expenditures for "the promotion or defeat of legislation" (and "the exploitation of propaganda") as well as "lobbying", and thus contains the very language which this Court found lacking in *Rumely.*

The activities to which taxpayers contributed in the present case were plainly designed to defeat legislation within the meaning of the regulation. The power of the people of the State of Washington to approve or defeat proposals by initiative or referendum is the exercise of a legislative power reserved to them by the State Constitution. *Senior Cit. L.* v. *Dept. Soc. Sec.*, 38 Wash. 2d 142. Deductions for similar expenditures have repeatedly been disallowed where, as here, activities were directed to influencing the electorate to adopt or defeat legislative proposals of this nature. *Revere Racing Assn.* v. *Scanlon, supra; F. Strauss & Son, Inc.* v. *Commissioner, supra; Sunset Scavenger Co.* v. *Commissioner, supra; Old Mission P. Cement Co.* v. *Com-*

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[3] The Court stated (p. 47):

> If "lobbying" was to cover all activities of anyone intending to influence, encourage, promote or retard legislation, why did Congress differentiate between "lobbying activities" and other "activities * * * intended to influence"? Had Congress wished to authorize so extensive an investigation of the influences that form public opinion, would it not have used language at least as explicit as it employed in the very resolution in question in authorizing investigation of government agencies?

missioner, supra.[4] The decision below is thus strictly in accord with an unbroken line of appellate decisions construing the scope of the regulation. And, even as an original matter, it can hardly be regarded as unreasonable to deny the deduction to *both* expenditures to propagandize the general public with respect to legislative action by their representatives (as in *Textile Mills*) and expenditures to propagandize the general public with respect to legislative action by the people themselves (as here).

2. The decision below also rests upon the additional independent ground that taxpayers, as the trial court found (R. 46), failed to prove in what particular manner their business would be injured by passage of the initiative measure and thus failed to establish that the expenditures were ordinary and necessary within the meaning of the statute. In attacking this holding (Pet. 14-15), taxpayers rely upon testimony by an officer of the Beer Wholesalers Association to the effect that 90 per cent of the beer wholesalers would be out of business if the initiative was adopted. This general statement, however, falls far short of demonstrating that the taxpayers themselves would have suffered, particularly in view of the same witness' admission (R. 76-77) that some of the wholesale distributors

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[4] The decision of the Tax Court in *Smith* v. *Commissioner*, 3 T. C. 696, relied upon by taxpayers (Pet. 10-11), involved the adoption of a self-operative amendment to the Missouri Constitution and hence (p. 702) "no legislation was needed or involved." The subsequent decisions of the Tax Court (cited *supra*, note 1), including its decision in *McClintock-Trunkey* v. *Commissioner* involving the same initiative measure as here, indicate that this distinction has, for all practical purposes, been rejected. For the views of the Court of Appeals for the Eighth Circuit, which includes the State of Missouri, see that court's recent opinion in *Strauss* v. *Commissioner*, *infra*, p. 12.

would still be required to have representatives call upon the State Liquor Board to sell their merchandise. Nor can judicial notice (Pet. 14) serve as a substitute for such a showing. The initiative proposal, it should be noted, was not a prohibition measure, but only a measure designed to have beer and wine sold through state-owned stores.

CONCLUSION

The principal issues involved in this petition have previously been determined by this Court, and there is no conflict among the Courts of Appeals. Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
HARRY BAUM,
MYRON C. BAUM,
Attorneys.

FEBRUARY 1958.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 15,864

F. STRAUSS & SON, INC. OF ARKANSAS, PETITIONER

VS.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition to Review Decision of The Tax Court of the United States.

(January 24, 1958)

Before GARDNER, Chief Judge, and WOODROUGH and VOGEL, Circuit Judges.

GARDNER, Chief Judge.

This matter is before us on petition to review a decision of the Tax Court which determined a deficiency in petitioner's income tax for the year 1950 in the amount of $10,386.12.

Taxpayer is a corporation which at all times here pertinent was engaged in the wholesale liquor business in Little Rock, Arkansas. The sale of liquor in Arkansas has been legal since 1935, subject to state laws providing for county-wide option. At a general election held in November, 1950, there was submitted to vote, pursuant to the Arkansas law, an initiated measure in the nature of a state-wide prohibition act which by its terms would have made it unlawful to manufacture, sell, barter, loan or give away intoxicating liquors within the State of Arkansas, or to export from, import to or transport the same within the state.

In this situation taxpayer and eight other wholesale liquor dealers organized a corporation known in the

record as the Arkansas Legal Control Associates, Inc., which we shall hereinafter refer to as the corporation. The purpose of the wholesalers in forming the corporation was to persuade the electorate to vote against the proposed prohibition act, and for the period from May 30 to November 30, 1950, the corporation received contributions totaling $126,265.84 and disbursed over $100,009 for direct advertising through newspapers, radio, billboards, book matches, bar banners, special folders and press releases. Such advertising contained arguments designed to convince the voters that it was in the public interest to defeat the proposed prohibition act. Taxpayer's contribution to the corporation amounted to $9,252.67. On its income tax return for 1950 taxpayer deducted this amount from gross income as an ordinary and necessary business expense but the Commissioner disallowed this deduction.

In the Tax Court taxpayer contended that its payment to the corporation was deductible as a business expense, or alternatively, as a contribution. The Tax Court determined that the payment made by taxpayer to the corporation was neither deductible as a contribution under Section 23(q) of the Internal Revenue Code of 1939 nor as a business expense under Section 23(a)(1)(A) of the Internal Revenue Code of 1939. Taxpayer has now abandoned its contention that this payment to the corporation was a contribution deductible under Section 23(q) of the Internal Revenue Code of 1939, but adheres to its contention that its payment to the corporation was an ordinary and necessary business expense under Section 23(a)(1)(A) of the Internal Revenue Code of 1939, and that is the sole question presented for our determination.

Section 23(a)(1)(A) reads in part as follows:

> "In computing net income there shall be allowed as deductions: * * * All the ordinary and necessary

> expenses paid or incurred during the taxable year in carrying on any trade or business * * *."

The statute does not define nor determine what is or is not an "ordinary and necessary" business expense. Deductions are a matter of legislative grace and do not turn on general equitable considerations and the burden of clearly showing the right to the claimed deduction is on the taxpayer. *Deputy* v. *DuPont,* 308 U.S. 488; *New Colonial Co.* v. *Helvering,* 292 U.S. 435; *Omaha Nat. Bank* v. *Commissioner of Internal Rev.,* 8 Cir., 183 F.2d 899; *O'Malley* v. *Yost,* 8 Cir., 186 F.2d 603; *Wetterau Grocer Co.* v. *Commissioner of Internal Rev.,* 8 Cir., 179 F.2d 158; *Montana Power Company* v. *United States,* 3 Cir., 232 F.2d 541. In *New Colonial Co.* v. *Helvering,* supra, the rule is stated as follows:

> "Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed."

In *Omaha Nat. Bank* v. *Commissioner of Internal Rev.,* supra, in referring to the rule to be followed in determining income tax deductions we said:

> "In examining the taxpayer's argument we are required to be mindful of the rule that an income tax deduction is a matter of legislative grace and that the burden of clearly showing the right to the claimed deduction is on the taxpayer."

The statute allowing deductions for ordinary and necessary business expenses, as has been observed, does not define nor determine what is or is not an ordinary and necessary business expense. In this situation Section 29.23(q)-1, Treasury Regulation 111, was adopted definitely describing certain classes of expenditures as

not allowable deductions under this statute. The regulation reads as follows:

> "* * * Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses are not deductible from gross income."

This regulation has been in effect for nearly forty years and is in the nature of a proclaimed policy. It was considered and sustained by the Supreme Court in *Textile Mills Corp.* v. *Comm'r.,* 314 U.S. 326. In that case the court disallowed as deductions expenditures for services rendered in an attempt to procure legislation authorizing payment of claims submitted by former enemy aliens. In the course of the opinion the court among other things said:

> "The words 'ordinary and necessary' are not so clear and unambiguous in their meaning and application as to leave no room for an interpretative regulation. The numerous cases which have come to this Court on that issue bear witness to that. *Welch* v. *Helvering,* 290 U.S. 111; *Deputy* v. *duPont,* 308 U.S. 488, and cases cited. Nor has the administrative agency usurped the legislative function by carving out this special group of expenses and making them non-deductible. We fail to find any indication that such a course contravened any Congressional policy. Contracts to spread such insidious influences through legislative halls have long been condemned. *Trist* v. *Child*, 21 Wall. 441; *Hazelton* v. *Sheckells,* 202 U.S. 71. Whether the precise arrangement here in question would violate the rule of those cases is not material. The point is that the general policy indicated by those cases

need not be disregarded by the rule-making authority in its segregation of non-deductible expenses. There is no reason why, in absence of clear Congressional action to the contrary, the rule-making authority cannot employ that general policy in drawing a line between legitimate business expenses and those arising from that family of contracts to which the law has given no sanction. The exclusion of the latter from 'ordinary and necessary' expenses certainly does no violence to the statutory language. The general policy being clear it is not for us to say that the line was too strictly drawn."

See also *McDonald* v. *Commissioner,* 323 U.S. 57; *Roberts Dairy Co.* v. *Commissioner of Internal Rev.,* 8 Cir., 195 F.2d 948; *Sunset Scavenger Co.* v. *Commissioner of Internal Rev.,* 9 Cir., 84 F.2d 453; *Cammarano* v. *United States,* 9 Cir., 246 F.2d 751; *Revere Racing Association* v. *Scanlon,* 1 Cir., 232 F.2d 816; *American Hardware & Eq. Co.* v. *Commissioner of Internal Rev.,* 4 Cir., 202 F.2d 126.

Taxpayer is a corporation organized for the purpose of conducting a wholesale liquor business. It cannot, we think, be reasonably contended that expenditure in conducting a campaign for the defeat of a proposed prohibition enactment was an ordinary and necessary expense of "carrying on" a wholesale liquor business. The corporation was empowered by its charter to conduct a wholesale liquor business and it was not empowered by its charter or articles of incorporation to conduct political campaigns. In *McDonald* v. *Commissioner, supra,* petitioner made very substantial expenditures in his campaign to be re-elected a judge and he sought to deduct these expenditures as ordinary and necessary business expenses. In denying the right

to make these deductions, the court among other things said:

> "He could, that is, deduct all expenses that related to the discharge of his functions as a judge. But his campaign contributions were not expenses incurred in being a judge but in trying to be a judge for the next ten years."

In that case, as in the instant case, it was urged that the expenditure was necessary as his defeat in the election would ruin his business. Quite aside from the Treasury Regulation, we think it cannot be said that this statute, Section 23(a)(1)(A) of the Internal Revenue Code of 1939, is a clear provision for such allowance.

It is urged by taxpayer that the quoted regulation, if applicable, is invalid, and in this connection it is contended that as there has been no real re-enactment of the Internal Revenue Code since this regulation was approved by the Supreme Court in the *Textile Mills* case, *supra,* the question of its validity is still an open one and, hence, it is not entitled to the support of the principle that repeated Congressional re-enactment of the statutory provision to which a regulation pertains gives it the force and effect of law. The decision in the *Textile Mills* case was presumably well known to the Congress. The Congress has had many sessions since this decision was handed down and the regulation itself has been in effect for nearly forty years, and presumably that fact was also well known to the Congress. Nevertheless, the Congress has passed no act rejecting the construction given this statute by this regulation. *United States* v. *Armature Rewinding Co.,* 8 Cir., 124 F.2d 589; 47 C.J.S. Internal Revenue, Section 70, p. 201. In *United States* v. *Armature Rewinding Co., supra,* in referring to the fact that the Congress had passed no act rejecting the construction adopted by the Commissioner of Internal Revenue, we said:

> "It has, however, become increasingly apparent that the purpose of a taxing act, the probable intent of Congress, the general statutory scheme of taxation set up, and the construction adopted by the Commissioner of Internal Revenue and not rejected by Congress must all be given appropriate effect in determining what meaning is to be accorded a word or a phrase in such an act."

The applicable rule is succinctly stated in 47 C. J. S. Internal Revenue, *supra,* as follows:

> "A treasury department regulation construing and interpreting an internal revenue statute is deemed approved by congress where congress thereafter substantially reenacts the statute. *A similar inference of congressional approval of the regulation is made where a substantial period of time has elapsed since the promulgation of the regulation and congress has not acted with respect to the statute * * *.*" (Italics supplied.)

Manifestly, under this regulation the deductions here claimed did not constitute ordinary and necessary business expenses.

Taxpayer contends that the doctrine of the *Textile Mills* case has been modified by the decisions of the Supreme Court in *Commissioner* v. *Heininger,* 320 U.S. 467, and *Lilly* v. *Commissioner,* 343 U.S. 90. The argument is plausible but not convincing. The *Textile Mills* case sustained without qualification the regulatory provision in question as valid. In *Commissioner* v. *Heininger* and *Lilly* v. *Commissioner,* both *supra,* the decisions were not based upon the Treasury Regulations but the question was whether certain expenditures were non-deductible because contrary to public policy. The court held they were not contrary to public policy and, hence, deductible. We think these decisions de-

tracted nothing from the teaching of the decision in the *Textile Mills* case.

We have considered all the other contentions urged by taxpayer but think them without merit. The decision of the Tax Court is therefore affirmed.

A true copy.

Attest:

EUGENE C. FISHER,
Acting Clerk,
U. S. Court of Appeals, Eighth Circuit.

SEAL.

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